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Rights and Principles: The web

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ABSTRACT

Labour Law's new challenges should take us back us to its basis: the Principles of Labour Law.

But what is a Principle and what are its functions?

Principles of Labour Law are adaptations of General Principles of Law; the Protection Principle, on which Labour Law is based, includes the General Principle of Compensation.

Principles are basic rules of human behaviour and of law application and they are *the pillars* of the legal system, together with human rights, having their same supra-constitutional hierarchy and universal nature, creating both the web of the Universal Labour Law.

Principles are general and abstract but, *because of that*, they solve specific issues, such as the scope of Labour Law, determining the connecting factors and the applicable legislation in international labour cases, and the scope and limits of collective autonomy.

KEY FACTS

- The paper examines the Principles of Labour Law (e.g. the most favourable norm, the most beneficial condition, *in dubio pro operario*), widely applied in Latin America, mainly due to Uruguayan Professor Plá Rodríguez's studies.
- However, the paper concludes that the Principles of Labour Law have a universal perspective, since they are adaptations of the General Principles of Law.
- The paper also addresses the role of (Labour) Principles in the legal system, their normative function and their relation to (labour) human rights.
- Finally, it analyses some practical and important applications of the Principles of Labour Law

THE MESSAGE

Considering the special issues that Labour Law is currently dealing with, it is relevant to recall to its very basis, which are the Principles of Labour Law, which guide us in the solution of the different situations and which, in addition, enable the construction of a Universal Labour Law.

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What my eyes beheld was simultaneous, but what I shall now write down will be successive, because language is successive. Nonetheless, I will try to recollect what I can ⁽¹⁾

Jorge Luis Borges, *El Aleph*

1. Introduction

We have celebrated ILO's 100 years in a very special moment for Labour Law, dealing with certain issues that have shaken even the foundation of this field of the Law.

In such context, it would be relevant to recall the very basis of Labour Law, condensed in the concept 'labour is not a commodity', the first concept expressed in ILO's Declaration of Philadelphia.

Trying to get the essence of such concept, we extract two main elements:

1) First, the **human-centred approach**. Following Ingram's words, work cannot be spoken «as if it were an independent entity, separated from the personality of a workman», and it cannot be treated «as a commodity, like corn or cotton — the human agent, his human needs, human nature, and human feelings, being kept almost completely out of view» ⁽²⁾.

2) Directly related and even as a result of such human-centred approach, 'labour is not a commodity' ultimately expresses the '**protection**' (or '**protective**') **principle**, in which relays the purpose or the *raison d' être* of Labour Law. As Ermida Uriarte has stated, Labour Law is protective or, if not, it is not Labour Law ⁽³⁾, because it is the very recognition or application of the compensation principle, in order to reduce the inherent inequality within the employment relationship and, as a consequence, it is a protective law ⁽⁴⁾.

But what are the contents of the protection principle and what is its role in the legal system?

As regards the first question (**the contents**), and following Plá Rodríguez's classification, we could say that the protection principle is manifested in three different rules:

- a) *In dubio pro operario* (if one norm can be understood in more than one way, it shall be interpreted in the way that benefits the employee)
- b) The most favourable norm (if there is more than one applicable norm, the prevailing one shall be the one being most favourable to the employee)
- c) The most beneficial condition (a new norm shall not eliminate or reduce the most beneficial conditions established in previous ones).

But there are other principles in Plá Rodríguez classification:

- 1) The principle of non-renouncing (the employee's legal inability to voluntarily deprive of labour benefits)

⁽¹⁾ «Lo que vieron mis ojos fue simultáneo: lo que transcribiré, sucesivo, porque el lenguaje lo es. Algo, sin embargo, recogeré».

⁽²⁾ Quoted by S. EVJU, *Labour is not a commodity A Reappraisal*. Oslo/Kongsberg Institutt for privatrett, 2012, p. 6.

⁽³⁾ O. ERMIDA URIARTE, *Meditación sobre el Derecho del Trabajo* [Meditation of Labour Law]. Cuadernillos de la Fundación Electra/*Electra Foundation Booklets*, Montevideo, 2011, p. 8.

⁽⁴⁾ *Ibid.*

- 2) The principle of continuation (the preference of Labour Law for long lasting contracts of employment)
- 3) The principle of primacy of fact (in case of conflict between reality and documents, reality's fact shall prevail)
- 4) The reasonableness principle
- 5) The good faith principle.

However, other scholars suggest different classifications.

What's more, some authors have stated that all those principles are, after all, manifestations of the protection principle ⁽⁵⁾. Ackerman has expressed that it is hard to admit that the character of 'principle' of Labour Law can be attributed to other than the protection principle ⁽⁶⁾, since it is the only principle in which Labour Law is based on, being the others, its diversions.

We may agree with that idea. Nevertheless, we shall follow Plá Rodríguez classification because it is very well settled in Latin American practice. Anyway, ultimately it is a matter of names and classifications, but not of core concepts.

Indeed, classification is not the most important issue. What *does* count is: 1) on one hand, the contents of the principles and, 2) on the other hand, their role within the legal system.

In this paper, we shall not focus on the first item (the contents), which has been deeply analysed by scholars. Nevertheless, we must mention that, after Plá Rodríguez, other theorists have stated that there are 'second generation' principles of Labour Law ⁽⁷⁾, such as: 1) the special protection of the Law and, consequently, of the State, to any manifestations of work itself and for all working people, without distinction, 2) the respect and guarantee of working in equal and appropriate conditions, which must include, among others, the following rights: a) a remuneration able to cover physical, intellectual and moral needs, b) decent working conditions, c) health and safety at work, d) employment stability and promotion, e) limits to working time, f) the prohibition of child labour and the regulation of adolescents' work, g) the preservation of the employment in cases of illness and maternity; 3) specialised Labour Courts for individual Labour Law cases with an appropriate procedure, fast and free; 4) guaranteeing the 'collective' rights (freedom of association, union activity, collective bargaining and strike); 5) an adequate protection from the Social Security system; 6) the right to receive permanent training. However, we consider that the denomination 'principles' is herein attributed to certain elements that, conceptually, are not principles, but rights; however, it is important to underline this perspective in order to show that the contents of the principles, albeit already deeply analysed, could certainly suffer some variations. Though, we shall follow Plá Rodríguez's classification and description of the contents, whilst that does not mean that it's the definite point of view.

Having made such clarification, we have to indicate the topics that we *will* address in this contribution: we shall focus on the second item: the function of the principles within the legal system, being fully aware that it leads us to an abstract and difficult field.

⁽⁵⁾ Cfr. O. ERMIDA URIARTE, *op. cit.*

⁽⁶⁾ M. ACKERMAN, *Tratado de Derecho del Trabajo*, tomo I [Treatise of Labour Law, volume I]. Buenos Aires, Rubinzal-Culzoni Editores, 2005, p. 314.

⁽⁷⁾ Cfr. H-H. BARBAGELATA, *Los Principios del Derecho del Trabajo de Segunda Generación* [The Second Generation Principles of Labour Law], in *IUSLabor*, 1/2008.

2. Principles

2.1. Conceptualization

2.1.1. General Principles of Law

To start with, it is unavoidable to take into account the general principles of law, attempting to arrive to a conceptualisation and, then, determining which is the relationship between general principles and Labour Law principles, if any.

When trying to determine what is exactly a general principle of law, we face two problems:

The first one is the polysemy. In this sense, Bengoetxea ⁽⁸⁾ identifies the following meanings conferred to the word ‘principle’: to mark certain important characteristics of a legal system; to express general concepts obtained from particular rules of a legal system; to designate those rules of the legal system which have a fundamental character; to refer to the consequences derived from a group of rules; to describe those rules that formulate the general aims of a legal system; to identify the rules obtained through inductive reasoning comparing the different legal systems and, finally, to refer to natural law’s rules, based on justice and equity standards, among others.

The second difficulty is that, unfortunately, there are not too many researches that clearly identify and analyse the contents of each one of the general principles of law without referring to any specific branch of the Law.

To overcome these two difficulties, it may be helpful to turn to certain International Law’s concepts. In this regard, there are some very relevant conceptualisations:

Jiménez de Aréchaga taught that International Law has three sources: the treaty, the custom, and the general principles of law, and recalls that article 38 ap. 1 inc. c) of the Statute of the International Justice Court expresses that the Court shall apply ‘the general principles of law recognised by civilised nations’, specifying then that such principles are

those basic rules, essential in every legal system, that can be found in Public as well as in Private Law; for example, the rule which stipulates that whoever commits unlawful acts causing damage shall be liable for economic loss; the rule according to which no-one is judge in his own cause; the principle of unjust enrichment; the principle of *res judicata*; etc. In sum, they are those basic and fundamental precepts in positive law – in some systems, such as in ours, formulated in the Constitution or in the Codes, whereas in other systems, been understood as underlying key principles – since, as Carnelutti expressed, they are within the legal system as alcohol is within wine: they constitute the very essence or spirit of the Law. Those principles, which have been decanted by humanity’s legal consciousness throughout centuries and are compatible with the organic structure of the international community, are also positive law in International Law, directly applied to relationships between States. Even though they firstly aroused and developed to rule relationships between individuals, they reflect in such a way the basic feelings of justice and natural equity that must also be applied to rule the relationships between States [...]. It has been accurately said that this source constitutes the reception of a sort of a new *jus*

⁽⁸⁾ Cfr. J. BENGUETXEA, *The Legal Reasoning of the European Court of Justice*. Oxford, Clarendon Press, 1993, p. 72.

gentium, similar to that which in Roman law had emerged based on the edicts of the magistrates, which recognised certain basic principles of justice applied to all individuals, whatever their nationality ⁽⁹⁾.

Jiménez de Aréchaga continues stating that

the importance of the general principles in international courts' cases is not limited to substantive law, since many procedural issues, not regulated in any treaty, have been resolved by applying procedural principles inherent to any legal system or, as the Permanent Court has expressed, 'essential elements to all judicial proceedings'. B. Cheng (1953, 25 and 26, 257 and 390) lists among them the principles of *audiatur et altera pars*, *jura novit curia*, *res judicata*, the power of any court to decide its own jurisdiction, the *onus probandi* required to those who claim, etc. ⁽¹⁰⁾.

Considering this quotation and reflecting upon it, if we had to express in a few words a concept or a brief description of the general principles of law, we could say that:

1) They are the **basic rules of conduct or behaviour** but also basic rules of the **application** of the law, including, in the expression "application", both the **interpretation** of the law as well as the **procedure**. It is relevant to highlight the importance of the application of the law, since it is the way that law comes into life in specific cases, and that's precisely why general principles of law refer to it (besides referring also to the basic rules of conduct and of procedure). In fact, as Grossi has pointed out, Law is more application than rule ⁽¹¹⁾.

2) If we consider which would be the **ultimate aim** of these 'basic rules' that principles are, we would say that they are **the means that enable the protection of rights**, understanding by 'rights' those values and protected interests that constitute human rights (life, health, freedom, equality, work, property, honour, etc.). Principles do not recognise rights to human beings solely for being humans; that is what human rights do. Principles are the basic rules of conduct or behaviour but also the basic rules of the application of the law whose ultimate aim or purpose is to bring to life those protected interests that are human rights.

3) They are so basic or essential that **they apply to all**: to States as well as to individuals.

2.1.2. General Principles of Law and Principles of Labour Law

Is there any relationship between the general principles of law and the Labour Law principles?

⁽⁹⁾ E. JIMÉNEZ DE ARÉCHAGA, H. ARBUET-VIGNALI, and R. PUCEIRO RIPOLL, *Derecho Internacional Público. Principios, Normas y Estructuras*, tomo I. [International Public Law. Principles, Norms and Structures. Volume 1]. Montevideo, Fundación de Cultura Universitaria, 1 ed, 2005, p. 218-219.

⁽¹⁰⁾ E. JIMÉNEZ DE ARÉCHAGA, *op. cit.*, p. 223.

⁽¹¹⁾ P. GROSSI, *Mitología Jurídica de la Modernidad* [The Mythology of Modern Law]. Madrid, Editorial Trotta, 2003, p. 60.

The first common element that can be found is that, when it comes to Labour Law principles, we find the same **polysemy** issue as with the general principles. In this regard, Ackerman has pointed out that

there have been called ‘principles of Labour Law’ many different things such as: rules of interpretation and application, legal instruments such as the continuation of the employment relationship, descriptions of certain legal treatments, such as the non-waivable rights, general rules of law, like the good faith and the primacy of fact, and civilization’s common aspirations, such as the non-discrimination, equity and reasonableness ⁽¹²⁾.

But there is another common element: in essence, **Labour Law principles set basic rules of conduct and of application of the (Labour) Law, just as general principles do, and their ultimate aim is the respect of (labour) human rights**, just like general principles of law.

Hence, we shall assert that there is a relationship between Labour Law principles and the general principles of law, but exactly which one? And what have scholars said about it?

Some scholars, such as Plá Rodríguez ⁽¹³⁾ and Ackerman ⁽¹⁴⁾, hold that the principles of Labour Law cannot be identified with nor derived from the general principles of law.

However, other authors have a different point of view. That is the case of Lalanne, who describes the general principles of law and, following Vallet de Goytisolo, proposes this classification:

First, there would be three main natural-ethical principles: 1) *Omnes sicut teipsum*; 2) *Bonum est faciendum et prosequendum et malum vitandum*, and 3) *Honeste vivere, alterum non laedere, suum cuique tribuere*. He affirms that they are the source of a group of general principles of law, including: a) the principle of legal justice, which compels all community members and authorities to do whatever necessary in order to achieve public good; b) the distributive justice principle, according to which ‘there is nothing more unequal as the equal treatment of those being unequal’; c) the principle of commutative justice, or the principle of reciprocal obligations; d) the common principles, such as *nemo potest ad impossible obligari* or *nemo plus iuris ad alium transferre potest, quam ipse habet*.

Lalanne then expresses that at a lower level there would be the principles common to most legal systems, which constitute the *jus gentium*, recognised in the Statute of the International Court of Justice (art. 38).

Then the author refers to the “principles of each legal system”, and at this level he places the principles of Roman law, such as *lex posterior derogat priori, iura novit curia, lex specialis derogat generali, res iudicata pro veritate habetur, nemo debet locupletior fieri cum alterius detrimento, qui prior est tempore, potior est iure, nemo plus iurus ad alium transferre potest, quam ipse habet, qui tacet consentire videtur* ⁽¹⁵⁾.

⁽¹²⁾ M. ACKERMAN, *op. cit.*, p. 311.

⁽¹³⁾ A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law], Montevideo, Fundación de Cultura Universitaria, 4 ed, 2015, p. 29 and 42.

⁽¹⁴⁾ M. ACKERMAN, *op. cit.*, p. 307.

⁽¹⁵⁾ J. LALANNE, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law], in *Labour Law Journal*, no. 11, 2015, p. 150.

Finally, Lalanne expresses that

The principles of certain branch of the law [...] derive from and depend on the general principles of the entire Law itself, from which they can be deduced. For instance, the principle which orders to protect the employee is a means intended to reach equality in employment relationships (derived from the principle of commutative justice, or the principle of reciprocal obligations), equality or balance that, in case of massive non-compliance, would put at risk social peace and security, values that, in turn, constitute essential elements of the common good, object of the legal justice and the goal of Law itself and, therefore, the utmost principle of the legal system as a whole ⁽¹⁶⁾.

Other authors propose another criterion, though also asserting the relationship between general principles and principles of Labour Law. That seems to be the case of Podetti, who, when analysing the rule *in dubio pro operario*, states that the protection principle is a diversion from the *favor debilis* general principle, expressing that

In the beginning, the *in dubio pro operario* principle was considered as an inversion of the Civil Law principle according to which dubious cases should be resolved favouring the debtor [...]. Currently, there has been a transformation within Civil Law, going from a protection based on the obligatory position of the debtor, to a protection based on the contractual situation. The first protection is related to the *favor debitoris* principle, whereas the second one refers to the *favor debilis* principle, protecting those contractors in weak positions (Lorenzetti). Thus, the principle *in dubio pro operario* is no longer an exception or inversion, but a **diversion of the *favor debilis* general principle** ⁽¹⁷⁾.

We agree with the core idea held by these authors, understanding that Labour Law principles are derivations or, better said, **adaptations** of the general principles. They are the basic rules of conduct and of application of the law required to guarantee rights, but, in this specific branch of the law, they are adapted so as to comply with the aim of this branch and, therefore, being able to guarantee the (human) rights mostly related to that particular field of the Law: labour human rights. Nevertheless, it is relevant to specify that this adaptation is not always required and, in those situations, general principles of law, in their ‘original’ version, shall be applied (e.g.: the principle of good faith or the principle of reasonableness).

Indeed, in general principles as well as in principles of Labour Law we find the same kind of basic rules, related to the substantial law and also to the application of the law. Referring to general principles, Jiménez de Aréchaga pointed out that they were ‘general rules of behaviour’ as well as ‘rules for interpretation and application of the law’. Referring to the principles of Labour Law, Ackerman says something similar when he sets his classification, proposing that: 1) On one hand, there are those principles which can also respond to an axiological preference, but are not exclusive of Labour Law (and can be thus considered as general principles of law applied in Labour Law), such as good faith, equality, social justice, equity, primacy of fact, and 2) On the other hand, there are those principles that are “practical expressions of the protection logic”, and here he places what he calls the “technical means” used by Labour Law to

⁽¹⁶⁾ J. LALANNE, *op. cit.*, p. 158.

⁽¹⁷⁾ H. PODETTI, *The Principles of Labour Law*, in *Labour and Social Security Institutions*, series G, n. 188, of the UNAM Legal Investigations, 1997, p. 148 (emphasis added).

protect the employee, which are rules of interpretation of the legal standards (*in dubio pro operario*), rules to select the applicable rule of law when facing with a choice of law issue (most beneficial condition); to define the limits of the contractual freedom/non renunciation⁽¹⁸⁾. Similarly, Valverde distinguishes between: 1) principles that arrange the sources of Labour Law, known as principles of ‘application’ (the most favourable norm, non- renouncing, and the most beneficial condition); 2) what he calls ‘traditional principles of Labour Law’, including here the stability principle, referred to the termination of employment relationships and its causality; 3) the third group of principles is formed by those that govern labour proceedings⁽¹⁹⁾.

Principles of Labour Law are, thus, basic rules of conduct as well as rules of application of the law, just like general principles are too, but adapted for this branch of the law, in order to fulfil its particular aim: to protect the employee, so as to achieve a counterbalance in the employment relationship, reducing its initial inequity derived from its inner asymmetry of power, and thus, applying (or *adapting*) the general principle of compensation, and enabling the effective respect of (labour) human rights. As all the other principles of any other branch of the law, principles of Labour Law are those that confer it its autonomy.

In addition, we should bear in mind that Labour Law principles did not appear suddenly out of nowhere, and this is another reason to consider them as adaptations of the general principles. **The legal system is one**, it forms a **unit** and, though it may seem too obvious, it is not always taken into account. However, the general point of view is essential, because seeing parts of the whole would never make us see what they truly are, and only a global perspective can make us see something as it actually is.

In sum, the protection principle includes certain special rules (*in dubio pro operario*, the most beneficial condition and the most favourable norm) that, precisely in order to accomplish its protective (*compensating*) function, it *adapts* the general rules of application, such as ‘subsequent laws repeal prior laws’, or ‘a rule with a superior position in the hierarchy of law repeals a rule in an inferior position’. The same occurs with the principle of non-renouncing, which also implies an alteration of general basic rules, such as the free will autonomy. Plá Rodríguez develops the different theories created in order to explain the basis of the principle of non-renouncing, but we could say that, ultimately, it protects the employee in order to guarantee a free will in the labour contract, as other means of balancing the power positions initially unequal. Therefore, general principles of law, and their respective adaptations, are basic rules developed in order to guarantee those protected interests that are human rights, within employment relationships.

Once arrived to this conclusion, the next arising question is: which is the role of principles in the legal system?.

⁽¹⁸⁾ M. ACKERMAN, *op. cit.*, p. 316.

⁽¹⁹⁾ M. VALVERDE, *Principios y Reglas en el Derecho del Trabajo: Planteamiento Teórico y Algunos Ejemplos* [Principles and Rules in Labour Law: Theoretical Proposal and Some Examples], in *Revista Española de Derecho del Trabajo* No. 114/*Spanish Labour Law Journal* No. 114, 2002, p. 829.

2.2. The Role of Principles within the Legal System

In Uruguay and generally in Latin America, Labour Law principles, as analysed and systematized by Plá Rodríguez, have acquired the utmost importance when it comes to solve labour cases, currently acting as binding law, and having a high hierarchical position in the labour legal system. Indeed, as Raso Delgue has pointed out, Plá Rodríguez's book about the principles of Labour Law has become the legal axis of a protective conception of this field of the Law, and that the author's opinion would transform in actual legal rules – prevailing over written law –, and would influence on the entire continent, and beyond ⁽²⁰⁾. Coincidentally, Barretto Ghione has expressed that Labour Law principles, as developed by Plá Rodríguez, act as being part of positive law, and that his book is part of the national legal system due to its deeply rooted importance in teaching and applying labour law ⁽²¹⁾.

In fact, they have been applied through decades in Uruguay and also in most Latin American countries, and in an even and smooth way, ***not arising deep controversies or problems, but, instead, solving them.***

Nevertheless, many theorists still sustain the opinion that principles of Labour Law are not binding law. Plá Rodríguez himself expressed that

According to Spanish Civil Law scholar Federico De Castro, law principles have 3 functions: 1) informative: they inspire the legislative body, and in that sense they are the basis of the legal system; b) normative: they are used as supplementary (residual) law, when there is no applicable law for a particular case; c) interpretative: they serve as a guiding standard for judges and readers ⁽²²⁾.

In addition, he clearly stated that Labour Law principles are a material source of the law but not a formal source, expressing that the only way they can have a normative function is when used as residual law in case of a gap in the law, ⁽²³⁾, referring to those cases in which positive legislation allows it, as it occurs, for instance with art. 16 of the Uruguayan Civil Code ⁽²⁴⁾.

However, there are some arguments that may lead to a different conclusion, as we will see in the following paragraphs.

⁽²⁰⁾ J. RASO DELGUE, *Labour Law as a Branch of the Law and its New Borders*, in *Chilean Journal of Labour Law and Social Security*, vol. 7, No. 13, 2016, p. 16.

⁽²¹⁾ H. BARRETTO GHIONE, *Teoría y Método en Derecho del Trabajo. Su Aplicación a los Consejos de Salarios* [Theory and Method in Labour Law. Its Application to the Wage Councils]. Montevideo, Fundación de Cultura Universitaria, 2018, p. 14.

⁽²²⁾ A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo ¿Constituyen una Fuente del Derecho?* [Principles of Labour Law: are they a Source of Law?], in *Treinta y Seis Estudios sobre las Fuentes del Derecho del Trabajo/Thirty Six Studies about Labour Law's Sources*. Montevideo, Fundación de Cultura Universitaria, 1995, p. 13.

⁽²³⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, p. 15.

⁽²⁴⁾ As many Civil Codes, art. 16 of the Uruguayan Civil Code states that when a legal text cannot be solved through its own words or through their inner sense, it shall be solved through provisions that regulate analogous subjects, and then, through the general principles of law and the scholars' works.

2.2.1. The Block of Constitutionality Theory

It is relevant to consider if the theory known as ‘the block of constitutionality’ has some impact on this issue related to the role and function of the principles as binding law and their value as formal – as well as material – source of the law.

According to this theory, firstly developed in France and applied by Latin American Courts, **all human rights, even though those not specifically written in the Constitution, are considered as being part of it**, including those rights (directly or indirectly) recognised in national as well as in international norms. Therefore, no law can repeal them, and States have the obligation to act in order to comply with them.

Scholars have also proposed that it applies to all human rights, regardless of having them been established in ratified treaties, an opinion with which we fully agree. Barbagelata⁽²⁵⁾ expresses that the claim of universality of human rights goes beyond the limit of the States’ ratification, and that all instruments referred to human rights – and, among them, labour human rights –, are a kind of international instrument that does not belong only to the scope of the treaties between States, but to the scope of *jus cogens*, which makes them become independent from the need to be ratified to become in force⁽²⁶⁾. Barbagelata quotes authors such as Pecht Pizarro, who expressed that even those international labour conventions that have not been ratified, are nonetheless binding, if they recognise principles or rules of General International Customary Law⁽²⁷⁾.

Barbagelata takes into account that, regarding 1998 ILO’s Declaration, some authors understand that the ‘fundamental’ rights are only a few, but finally confirms his opinion, based on the fact that giving priority or strongly demanding the ratification of certain ILO’s Conventions referred to certain (labour) rights does not mean that others shall lose their nature as fundamental human rights⁽²⁸⁾. In addition, he agrees with and quotes Ermida Uriarte, expressing that the 1998 Declaration ought to be considered as **the beginning of a process that confers these rules a universal nature, regardless of the treaties’ ratification**, and therefore it is one of the instruments that consolidates the content of *jus cogens* and the Universal Human Rights Law⁽²⁹⁾.

In fact, Ermida Uriarte had stated that

Human rights are fundamental rights and vice-versa. As expressed by Spanish Professor Valdes del Re, human rights are fundamental because they are inherent to all human beings and come from human dignity [...] Human rights are like human beings’ essential content from a legal point of view, and, therefore, they all universal, non waivable, intangible, because they are the legal expression of human beings themselves⁽³⁰⁾.

⁽²⁵⁾ In his book *Human Rights and Humanitarian Norms as Customary Law*.

⁽²⁶⁾ H-H. BARBAGELATA, *El Particularismo del Derecho del Trabajo y los Derechos Humanos Laborales* [The Peculiarities of Labour Law and the Labour Human Rights]. Montevideo, Fundación de Cultura Universitaria, 2 ed, 2009, p. 235.

⁽²⁷⁾ *Ibid.*

⁽²⁸⁾ *Ibid.*

⁽²⁹⁾ H-H. BARBAGELATA, *op. cit.*, 2009, p. 239 (emphasis added).

⁽³⁰⁾ O. ERMIDA URIARTE, *Los Derechos Laborales como Derechos Humanos*, in Conferencia en el Postgrado Trabajo y Derechos Fundamentales de la Universidad de Castilla –La Mancha, Campus de Toledo/Lecture of the Postgraduate Course: “Work and Human Rights”, in the University of Castilla-La Mancha, Toledo’s Campus, 2010, p. 8.

As regards its practical consequences, Barbagelata states that the block of constitutionality theory is particularly important since it puts an end to the differences between monism and dualism in international law, and has opened a path towards the recognition of a Human Rights Law, with a supra-legal and supra-constitutional hierarchy [...]; it is no longer an internal or an international law, since it is universal ⁽³¹⁾ and quotes Mario de la Cueva, who stated that, instead of speaking of ‘international labour law’, we should speak of a ‘**Universal Labour Law**’.

But so far we have been referring to human rights. What about the *principles* of law, and, in particular, the principles of Labour Law? Does this theory have an impact on the issue we have laid out about the role and function of principles in the legal system?

Barbagelata stated that the constitutionality block is formed with not only by rules, **but also by principles** ⁽³²⁾, and specifies that this theory

demands the re-consideration of Labour Law principles, now based on labour human rights constitutionally recognised. According to Plá Rodríguez and other scholars, Labour Law principles were not immune to modifications in the law, since they considered that laws could change them, though, in practice, principles could become a strong resistance to the application of those provisions not being in accordance with them. But considering the position in which principles have been situated due to the block of constitutionality theory, it is not possible for the law to repeal a principle, because principles have now a constitutional hierarchy, since such principles, for example the protective one, are based on the Constitutions ⁽³³⁾.

We agree with this perspective that includes principles together with human rights within the block of constitutionality theory. And we state that **they both have the same hierarchy**. As expressed at the beginning of this paper, human rights are the ultimate protected interests, and principles of law, including all their adaptations, such as the principles of Labour Law, are the means by which law, when stated and when applied, can guarantee such rights. **There is a symbiotic relation between rights and principles**; one cannot exist without the other, and this implies that they are **universal** and have the same **supra-constitutional** level.

2.2.2. Positive Law's Arguments

In addition, *even if* adopting Plá Rodríguez – and other scholars’ – perspective about the function of the principles, who considered them to be applied **only when the law stipulated to do so, we would still arrive to the same conclusion**. Indeed, even under this perspective, we would never conclude that they are merely residual law, due to arguments related to positive law, logics and ontology. As Barbé Pérez stated ⁽³⁴⁾, many

⁽³¹⁾ H-H. BARBAGELATA, *op. cit.*, 2009, p. 222.

⁽³²⁾ H-H. BARBAGELATA, *op. cit.*, 2009, p. 223 (emphasis added).

⁽³³⁾ H-H. BARBAGELATA, *op. cit.*, 2009, p. 298-299.

⁽³⁴⁾ H. BARBÉ PÉREZ, *Los Principios Generales del Derecho como Fuente de Derecho Administrativo en el Derecho Positivo Uruguayo* [General Principles of Law as a Source of Constitutional Law in Positive Uruguayan Law], in *Los Principios Generales de Derecho en el Derecho Uruguayo y*

Constitutions and Codes establish that principles perform a gap-filling function, but that does not mean that principles are merely residual or that they do not exist when it comes to positive law; such a reasoning would be illogical. The logical way to understand those Constitutions and Codes is understanding that they **assume that principles have already been included (taken into account and respected) within positive law.**

As expressed by Barbé Pérez,

General principles of law are the principal and direct source of law: it would be ontologically absurd and a logical contradiction to support that general principles can only be applied in case of legal loopholes, that is, when there is no written rule. On the contrary, this means that it is assumed that written rules are *already according* to general principles [...] General principles of law can and must be applied by legislators, judges and the executive body as well, all under different circumstances and in different ways⁽³⁵⁾.

That is the reason why, in practice, it occurs what Alpa has pointed out, when he states that «In jurisdictional practice, principles receive a very extended application, not subordinate to hierarchical criteria, and **wider than the role that the legislator had foreseen** and prescribed a bit ingenuously»⁽³⁶⁾. He is referring to the preliminary provisions of the Italian Civil Code, but it is a very usual norm in many other Codes: the one stipulating that the law must be interpreted first with a literal and teleological criterion, and that «If the controversy cannot be decided with a precise disposition, one can turn to dispositions that regulate similar cases or analogous subjects, if the case still remains doubtful, it is decided according to the principles of the juridical system of the State» (article 12). Finally, Alpa states that «even if we wanted to conform strictly to the dictates of art. 12 prelaws, we would not be able to do so without turning to principles. This is because the use of principles is **innate to the interpretative process**»⁽³⁷⁾. And that's why the role of scholars is so important in the legal system; they analyse and outline the contents of the principles. As Barretto Ghione expressed when referring to Plá Rodríguez's book 'The Principles of Labour Law', labour scholars strongly influence the ruling field, to the extent of transforming it and transforming itself as the very true source of law. As for the law, the differentiation between the object and the study of such object is not easy to define at all⁽³⁸⁾.

2.2.3. Conclusions

As already mentioned, Plá Rodríguez had a different point of view when it came to the function of the principles: he considered that they have an interpretative function, they are residual law, and they are material sources for the law but not a formal source,

Comparado/*The General Principles of Law in Uruguayan and in Comparative Law*. Montevideo, Fundación de Cultura Universitaria, 2 ed, 2005, p. 26-28.

⁽³⁵⁾ H. BARBÉ PÉREZ, *op. cit.*, 2005, p. 28 (emphasis added).

⁽³⁶⁾ G. ALPA, *General Principles of Law*, in *Annual Survey of International & Comparative Law*, Vol. 1: Iss 1, Article 2, 1994, p. 18 (emphasis added).

⁽³⁷⁾ G. ALPA, *op. cit.*, 1994, p. 19 (emphasis added).

⁽³⁸⁾ H. BARRETTO GHIONE, *op. cit.*, 2018, p. 14.

expressing that Labour Law principles are placed **in another level**, different to the one on which the sources of law are placed ⁽³⁹⁾. We do not agree with Plá Rodríguez's point of view, because of the block of constitutionality theory as well as the above mentioned arguments (their relation to the general principles of law as well as with human rights). *However*, we cannot agree more with these words of his. Indeed: formal sources of law refer to the means or procedures required in order for a rule to acquire legal validity; and **principles are not created by any procedure**; they are, as Plá Rodríguez saw it, **in another level**, different from that of the sources', **because they are, such as their name itself denotes in its etymological sense, the origin; they are indeed the very source itself**.

Due to the above mentioned grounds, we agree with Lalanne when he expresses that principles accomplish not only **an informative, interpretative and gap-filling function, but also a limitative one, that is, behaving as an invalidation criteria of the positive law** [...] Principles act as the ultimate rules used to judge the application of the other rules ⁽⁴⁰⁾, since they are the source, the origin, the reason and the ground of the rest of the rules and institutions of a legal system ⁽⁴¹⁾. As Zagrebelsky has expressed, only principles fulfil a constitutional function, that is, 'constitutive' of the legal system ⁽⁴²⁾, and he also underlines the intrinsic contradiction of assigning principles, which are rules with a higher density of content, merely a secondary function. This derives from the prejudice of thinking that true legal standards are [written] rules ⁽⁴³⁾. We hold that principles of law, with their corresponding adaptations, are binding law, even if not written. As a matter of fact, as Plá Rodríguez pointed out, universal experience shows that establishing them in a specific text removes fruitfulness from them [...] Establishing principles in a text crystallises them and, therefore, freezes the role they can play ⁽⁴⁴⁾. In this sense, Grossi has also stated that Law is more application than rule. Beware of freezing it in an order [...] beware with the legal rule that remains in a printed text; there is a probable risk for it to become distant from life ⁽⁴⁵⁾.

In sum, together with human rights, principles have a supra-constitutional hierarchy, a universal nature, and are the direct and main source of Law and the very structure of the legal system, constituting a web.

⁽³⁹⁾ A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law]. Montevideo, Fundación de Cultura Universitaria, 4 ed, 2015, p. 43 (emphasis added).

⁽⁴⁰⁾ J. LALANNE, *op. cit.*, 2015, p. 165.

⁽⁴¹⁾ J. LALANNE, *op. cit.*, 2015, p. 137 (emphasis added).

⁽⁴²⁾ G. ZAGREBELSKY, *El Derecho Dúctil* [The Adaptable Law]. Madrid, Editorial Trotta, 2 ed, 1997, p. 110.

⁽⁴³⁾ G. ZAGREBELSKY, *op. cit.*, 1997, p. 117.

⁽⁴⁴⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 50.

⁽⁴⁵⁾ P. GROSSI, *op. cit.*, 2003, p. 60.

3. Rights and Principles: the Web

3.1. Conceptualisation

We have always believed that we have truly understood an issue – specially the abstract ones –, only if we are able to outline it in a few words or, even better, if we are able to express it with no words at all, but with a diagram. Probably, this belief is grounded in the fact that we sympathise with what Jorge Luis Borges' idea when expressed that *to think is to forget differences, to generalize, to make abstractions*.⁽⁴⁶⁾

Hence, in the previous paragraphs we made certain statements about the role of principles and rights in the legal system and their interdependence, but how could we outline such statements in a diagram?

We believe that the most suitable way is to represent the legal system as a web, a figure that signifies unity, that holds and organizes.

Principles and human rights shape the legal system as a web, in the following way:

Human rights (including, naturally, labour human rights) are placed in the very centre, being the main legally protected interests, and from such centre arise many concentric circles, each one corresponding to a different branch of the Law.

But in a figure made of concentric circles there are always lines that go through them and that can be seen even if they are not drawn, giving movement and dynamism to the circle. In this diagram, those lines symbolize the principles.

That would be the way we find to represent the **'frame' of the 'seamless web'**, to use Dworkin's phrase⁽⁴⁷⁾.

There may be myriad ways to diagram it, but to illustrate it now with some examples, we have chosen the following ones:



Fig. 1



Fig. 2

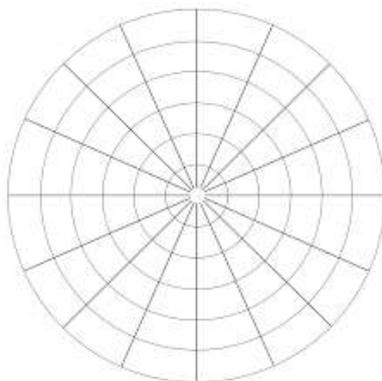


Fig. 3

⁽⁴⁶⁾ JL BORGES, *Funes el Memorioso* [Funes the Memorious].

⁽⁴⁷⁾ R. DWORKIN, *Taking Rights Seriously*, Bloomsbury Academic, 2013.

However, the most basic and simple diagram would be the **(spider) web** itself:



Human rights and principles possess the same **supra-constitutional hierarchy** and, being **all fundamental**; they build the frame or foundation of the legal system.

In this legal web, human rights are placed in the centre of the legal system, and principles emerge from such centre, as those basic rules (both of conduct and of application of the law), that **enable** the realisation of human rights in the specific cases. From the centre of human rights' circle would emerge concentric circles, each one representing one branch of the law, and each circle is crossed by the principles, with the corresponding adaptations of such branch; both rights (the circles) and principles (the lines) expand, distancing from the centre, as they acquire complexity and specificity, in each branch of the law.

As to the concentric circle corresponding to Labour Law, it is fully tinged by the protection principle, which is a manifestation of the (general) principle of compensation; hence, all the lines symbolising the principles, when cross the circle referred to this branch of the Law, are adapted in order to comply with the protection principle, and that's why the general principles, such as those related to the sources of the Law, the hierarchy, the derogations, the basic interpretation rules, acquire a different manifestation in the field (or circle) corresponding to Labour Law.

At this point, a confession is to be made: we considered to set out which would be *exactly* those adaptations, at least regarding Labour Law, identifying how exactly one principle derives from another, but finally we decided not do so do, not only because it exceeds the length and purpose of this paper, but also because enlisting in such project, which is, after all, a classification project, would weaken the main concepts that we want to express here: the relation between principles and rights and their function in the legal system. In fact, if we had attempted such task, we would have ended up tangled within the threads of the legal web, because, quoting once again Jorge Luis Borges, *it is clear that there is no classification of the universe not being arbitrary and full of conjectures* ⁽⁴⁸⁾. The classification of the legal universe shall be arbitrary, too. Principles are all interrelated, and therefore there would probably be as many classifications as persons classifying, each one with a valid criterion; many would defend that some principles are derivations from other principles and would draw the web with many ramifications inside; many would assert that actually certain rules

⁽⁴⁸⁾ JL BORGES, *El Lenguaje Analítico de John Wilkins* [The Analytical Language of John Wilkins].

should not be called ‘principles’, and there would be endless argumentations referred to from which principle derives another one. **By attempting this classification project, the focus would finally bein this subject, whereas the core ideas would vanish.** Legal theorists have pointed out the great obstacles of the principles’ classification: Raz has stated that «classifying laws into logically distinct categories has always been one of the major tasks of legal philosophy»⁽⁴⁹⁾. and Alpa has stated that «There is not a closed number of principles, and therefore they cannot be inventoried»⁽⁵⁰⁾. However, these considerations do not (and cannot) wreak what has already been said about the concept and function of principles in the legal system; the fact of not being able to have only one valid classification cannot make us conclude that principles do not exist or are not binding, because all the arguments already displayed addressing their function, are not even slightly moved at all by this classification issue. It is appropriate to take into account Alpa’s words, when he states that

«principles are also laws, they are norms with characteristics different from those that are written [...] they are vague and imprecise, but it is not for this that the written dispositions are to the contrary always clear and precise; they entail the use of an interpreter, but it is not for this that the other dispositions do not require interpretative choices; they encompass a wider range in their normative content than the other dispositions, but it is not for this that equally broad dispositions are not found in the legal system⁽⁵¹⁾ [...] [principles]constitute the modern *koiné* of jurists belonging to different systems [...] Today, principles fulfil the function that at one time was fulfilled by Roman rights: they tend towards the fusion of systems diverse in tradition and internal history»⁽⁵²⁾.

In spite of their abstraction and adaptability – or should we better say, precisely *because* of their abstraction and adaptability –, principles are able to give solutions to specific cases, and the fact of figuring them, together with principles, as a (spider) **web**, it contributes to **place them in the ‘legal map’**, contributes to **order the main concepts** and comprehend their functions. We shall present these effects in Labour Law in the following paragraphs, though being aware that they are not meant to be exhaustive.

3.2. Some Practical Consequences

3.2.1. The Normative Function of Principles

The first consequence of understanding principles as suggested in this paper, following the quoted authors, is that, together with human rights, principles do have a normative function, not being merely a ‘supplementary’, residual or ‘secondary’ law, but being instead the very source of the Law; either written or not, and the law must be **subject** to principles. We have already displayed this element, but we considered relevant to highlight at this point.

⁽⁴⁹⁾ J. RAZ, *Legal Principles and the Limits of the Law*, in Yale Law Journal Volume 81, Issue 5, Article 2, 1972.

⁽⁵⁰⁾ G. ALPA, *op. cit.*, 1994.

⁽⁵¹⁾ *Ibid.*

⁽⁵²⁾ *Ibid.*

3.2.2. The Universal Nature of Principles. The Universal Labour Law

Directly related with the above mentioned element, principles have a universal nature and a supra- constitutional hierarchy just like human rights do; principles are the instruments whereas rights are the substance; there is an **interdependence** between them.

Due to their fundamental and, thus, universal nature, they do not need to be written and they ought to be the frame of any legal system, in spite of the specificities of domestic law. The web, the frame, is wherever the same. The specific content therein, established in each country, certainly may vary, but always in accordance with human rights and principles.

As regards Labour Law, this means that the principles of Labour Law ought to be applied in every country, and therefore they are the basis of the **Universal Labour Law**.

3.2.3. The Human Component in Decision-Making

We have already referred to the difficulties that arise when trying to define and classify, specially principles, as a consequence of their abstraction and generality, two characteristics that also imply that principles can only be understood through *intellectual intuition*. I. Kant and other authors analysed this concept, but to summarize it in a few words, let us say that intellectual intuition is that wise understanding that *includes reason but also surpasses it*.

Intellectual intuition, by definition, corresponds to human beings; thus, principles could never be captured and comprehended by machines.

Indeed, it is not possible to present a clear, neat, unquestionable representation of the 'legal aleph'. It is not possible to apply principles with a binary or 'true or false' reasoning. It is not possible to establish a 'step by step' procedure for decision-making. As we shall display in the following paragraphs, principles 'come into life' and can be absolutely clearly seen *when facing specific cases*, and that is due to a reasoning that only we, human beings, are able to make.

Therefore, Labour Law (and law itself) could never be applied by machines. This is, then, an element we want to underline in this paper: **claiming the human component in decision-making**.

3.2.4. The Ductility and Usefulness of the Principles of Labour Law

The abstraction and generality of the principles of Labour Law give them the required ductility for resolving specific cases of all the issues of Labour Law, including its new challenges. This topic also deserve further investigation, but let us submit (what we consider) the core ideas:

3.2.4.1. *The Scope of Labour Law*

In the first place, principles allow us to determine which specific relations are ruled by Labour Law, according to ILO Recommendation 198, which in essence applies the protection principle together with the principle of primacy of facts. Indeed, on one hand, the protection principle is expressed in the idea that it shall be an employment relation when there is an **asymmetry of power** that demands a special protection in order to compensate it, and the asymmetry shall be evidenced through the different facts that the Recommendation describes, highlighting the elements ‘directing power’ or ‘subordination’, and the ‘externalisation of the fruits of the work’ (not belonging to the employee). On the other hand, the principle of primacy of facts is expressed in the concept that there shall be considered employment relations all those in which actually the above mentioned asymmetry exists, regardless of the contractual forms given by the parties; therefore **facts prevailing over contractual formalism**. It is relevant to specify that the principle of primacy of facts not only implies that facts shall prevail when there is a contradiction between reality and documents, but it also implies that if a particular entity or person exercised directing power over a person: the employee, such entity or person shall be considered as the employer, regardless such entity or person holding or not a legal personality. ⁽⁵³⁾.

Due to the application of this principles, there might be either one or multiple employers, or ‘co-employers’, to follow Raso Delgue’s expression ⁽⁵⁴⁾, or the ‘compound employer’, to use the name given by Uruguayan jurisprudence since many decades ago, notwithstanding the ‘group company’ liability.

In sum, the protection principle itself, and the principle of primacy of fact, should be the guide in order to determine if a particular labour relation is included within the scope of Labour Law or not.

But what happens with those working people whom, according to the above mentioned criterion, are considered to be outside the scope of Labour Law? Are there no work rules for them? Indeed, there are.

The work of those people not included in Labour Law has a protection, given by the concept of ‘**public order**’, that is to say, that compelling law; those norms from which no derogation is permitted at all, and that public order must always be respected, **regardless of the applicable branch of the Law**. Public order is a concept that goes beyond a particular field of the Law; there is a public order in Civil Law, a public order in Family Law, a public order in Corporate Law, and they all must be complied with in any issue referred to any branch. To express it graphically, we could say that public order is a special string of the web that crosses all concentric circles as represented in the *radius* drawn in *figure 2* of this paper.

Therefore, even if a specific working contract is excluded from the scope of Labour Law, that work must anyway comply with certain minimum conditions, set by the

⁽⁵³⁾ A concept known in Uruguay as the theory of the ‘employer’s personality’. As explained by Raso, this theory was first applied by our jurisprudence in 1949, when Judge Odriozola’s sentence stated that Labour Law recognises to companies a particular and own personality inside Labour Law issues, applicable even in those cases in which they do not hold a legal personality according to Corporate or Civil Law. Mentioned by J. RASO DELGUE, *La Contratación Atípica del Trabajo* [The Atypical Contracting of Work], 2 ed, 2009, p. 259.

⁽⁵⁴⁾ J. RASO DELGUE, *op. cit.*, 2009, p. 264.

concept of (work) public order, just as any other public order issues are respected within any branch of the Law.

Which would be the contents of this (work) public order? Public order is an undetermined concept, but recent ILO's concept of the '**universal labour guarantee**' brings light to this concept, including: 1) the rights referred in ILO 1998 Declaration (freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination); 2) an adequate living wage (the compliance with the minimum wage); 3) maximum limits on working hours; and 4) the protection of safety and health at work ⁽⁵⁵⁾. Moreover, though related to this last item, we want to specify that all working people, regardless of the type of relationship (dependent or independent), shall be included in a Social Security system, with both economic benefits as well as health services, so this would also be included in the 'public order' for working people.

These are the conditions that, due to their public order nature, are compelling to any working person, either dependent or independent and, therefore, being ruled by Labour or by Civil or Corporate Law. And Labour Law plays a leading role when giving contents to such concept (labour public order),

3.2.4.2. International Labour Cases

Principles not only are to be applied when determining if a particular case is included or not in Labour Law, but also when applying Labour Law as well as the contract's provisions to the particular case (e.g. interpreting, determining the applicable regulations according to the sources' system and 'procedural' subjects), but from all those situations, we would like to highlight one in particular, which is the one referred to Private International Law, and certain statements made by Ermida Uriarte. Indeed, he considers the different issues that may arise in international labour cases and solves them all through the application of the Labour Law principles. Just to illustrate some ideas, he expresses that

The protection principle does not have to limit its scope to domestic law. What is more, its application when determining connecting factors in International Labour Law issues is a clear and legitimate manifestation of the influence of substantive Labour Law on the conflict of law mechanisms and techniques [...] It has been said, as a criticism to this criterion of the most favourable rule, that it may be too difficult to apply since it requires to compare rules coming from different countries. However, such difficulty does not seem to be superior to the difficulties that arise when comparing two or more rules coming from the same domestic law ⁽⁵⁶⁾.

⁽⁵⁵⁾ «All workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers' rights, an "adequate living wage" (ILO Constitution, 1919), maximum limits on working hours and protection of safety and health at work. Collective agreements or laws and regulations can raise this protection floor. This proposal also allows for safety and health at work to be recognized as a fundamental principle and right at work» (ILO's GLOBAL COMMISSION ON THE FUTURE OF WORK, *Work for a Brighter Future*, 2019, p. 12 and 39).

⁽⁵⁶⁾ O. ERMIDA URIARTE, *Empresas Multinacionales y Derecho Laboral* [Multinational Companies and Labour Law]. Montevideo, Ediciones Jurídicas Amalio M. Fernández, 1981, p. 166-167.

A deep analysis of these topics go beyond the scope of this paper, but our aim is to present (what we consider) the main consequences of the position held, highlighting the fact that Labour Law principles shall be applied to all the regulations involved in labour law issues; in other words, principles of Labour Law shall be applied in substantive (labour) law but also to (labour) procedural law as well as to (labour) international law. And, as Ermida pointed out, in international labour law cases, principles ought to be considered when having to make a decision about which is the jurisdiction and the law to be applied in a specific case.

There is another important subject that we want to set out in this paper, but prefer to address it in a separate chapter, due to its special features, which is the application of principles in collective Labour Law.

3.2.4.3. *Collective Labour Law*

When it comes to collective Labour Law, the arising question is if the protection principle shall be applied, and in which way.

Plá Rodríguez address this topic and concludes that they must be applied, though with certain specificities, expressing that in collective Labour Law the protection principle implies

the need to guarantee the creation of collective agreements, as well as respecting their authenticity and freedom of action and operation. Once equality is re-established through the union's strength, the reason for receiving a special treatment from the State no longer exists. The compensatory inequality should be looked for either through one way or another, but not simultaneously, because, in such case, there would be a protections' superposition that would generate another imbalance in an opposite sense ⁽⁵⁷⁾.

In addition, he expresses that in this particular field of Labour Law acquires special relevance the principle of collective autonomy ⁽⁵⁸⁾.

Podetti seems to hold a similar opinion, as he proposes that there are two kinds of principles: on one hand, the protection principle, with its derived rules (non-renunciation, normative hierarchy, most beneficial condition, equality of treatment, *in dubio pro operario*, the principle of the facts prevailing upon documents and the principle of contract's continuity) and, on the other hand, the principle of collective autonomy and its derived rules as well (freedom of association, normative autonomy, self-protection and participation) ⁽⁵⁹⁾.

In this paper we cannot thoroughly discuss *all* the principles applied to collective issues; but we shall address two of them that have a very important effect in practice: the protection principle, with all its rules, and the principle of non-renunciation.

A) The Protection Principle

⁽⁵⁷⁾ A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law]. Montevideo, Fundación de Cultura Universitaria, 4 ed, 2015, p. 58.

⁽⁵⁸⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 59.

⁽⁵⁹⁾ H. PODETTI, *op. cit.*, 1997, p. 148.

When it comes to collective Labour Law, Plá Rodríguez states that the protection principle implies the legal capacity to make collective agreements ⁽⁶⁰⁾; thus, **the protection principle in collective Labour Law means the respect of these rights: freedom of association, collective bargaining and the right to strike**, which, as many authors have stated, are the tripod that enables the effective creation of collective labour rules.

And what would be the specific, consequential actions in which such respect should be translated?

The answer to this question is found in ILO's concepts ⁽⁶¹⁾:

1) First, it implies «a legislative framework which provides the necessary protections and guarantees, institutions to facilitate collective bargaining and address possible conflicts, an efficient labour administration and strong and effective workers' and employers' organizations».

2) In addition, it requires «the maintenance of fundamental civil liberties, in particular, the right to the freedom and security of the person, freedom of opinion and expression, freedom of assembly, the right to a fair trial by an independent and impartial tribunal, and protection of the property of trade unions and employers' organizations».

3) It also demands «the establishment of a mechanism allowing for the free and unobstructed registration of employers' and workers' organizations».

4) Very importantly, it implies «sufficient protection against acts of anti-union discrimination», which «is not granted by legislation if employers can in practice dismiss any worker, even if they pay the compensation prescribed by law for cases of unjustified dismissal, when the true reason is the worker's trade union membership or activities. If reinstatement is not possible, governments should ensure that the workers concerned are paid adequate compensation, which would represent a sufficiently dissuasive penalty for anti-trade union dismissals».

5) Moreover, it implies having «sufficiently prompt and impartial procedures».

A.1) In Dubio Pro Operario

Plá Rodríguez reminds us that many theorists support that this rule does not apply in collective Labour Law, since they understand that in these situations there is no longer an inferiority position of the employee, but he concludes that it ought to be applied anyway, because any Labour Law rule has a protective purpose, no matter if such purpose has been obtained by the Parliament or by the union [...] The inequity that has to be compensated emerges when applying the law, regardless the way in which such rule was created ⁽⁶²⁾. However, he underlines that this rule cannot substitute the other traditional hermeneutic criteria and, therefore, shall be applied solely 'as last resort' ⁽⁶³⁾.

A.2) The Most Favourable Norm

⁽⁶⁰⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 58.

⁽⁶¹⁾ Cfr. ILO, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director General*, 2008.

⁽⁶²⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 101.

⁽⁶³⁾ M. ACKERMAN, *op. cit.*, 2005, p. 340.

Plá Rodríguez holds the opinion that this rule acquires some special features in collective Labour Law, making the following considerations:

1) The comparison between rules must take into account the situation of the entire group, and not the situation of a particular employee individually considered. A collective agreement's clause prejudicial to an entire group of employees would be null, even if under some special circumstances that same clause could benefit a particular individual employee ⁽⁶⁴⁾.

2) Deciding whether a clause is or not more beneficial to employees does not depend on the subjective assessment of the persons involved. Such decision must be adopted objectively, according to the reasons that inspired the clauses ⁽⁶⁵⁾.

3) The comparison between two rules must be made considering the specific case, in order to know if the inferior rule is or not, in the particular case, most favourable to employees ⁽⁶⁶⁾.

The author then addresses the issue referred to whether the comparison must be made either regarding both rules as a whole or, on the contrary, taking from each normative body its most beneficial rules individually. After analysing the different theories, Plá Rodríguez concludes with an intermediate position, expressing that both normative bodies should be considered as a unity, because that's what they are after all, but specifying that the wholes taken into account are those formed by the rules related to the same issue, which cannot be separated without losing inner harmony ⁽⁶⁷⁾. Other authors, such as Ackerman, agree with the aforementioned theory ⁽⁶⁸⁾.

A.3) *The Most Beneficial Condition*

Plá Rodríguez analyses those cases of termination and modification of the collective agreements that imply the suppression of a benefit that had been established in it, and concludes that the final decision depends on what position has been adopted regarding the incorporation of collective agreements' clauses into the individual contracts of employment ⁽⁶⁹⁾. Currently, this theory does not have much support from scholars and from the law because, as Ackerman has described, it obstructs collective bargaining, limits state public labour policy and would create two different categories of employees, depending on their date of entry, with all the difficulties involved ⁽⁷⁰⁾. As Plá Rodríguez has expressed, if this theory is not applied, then, the benefits established in a collective agreement rule only as long as such collective agreement is into effect ⁽⁷¹⁾.

B) The Non-Renunciation Principle

Plá Rodríguez sets out how the non-renunciation principle is applied in case of waivers made through collective agreements, and maintains that if the renunciation prohibition is considered to be based on the assumed defects of consent, then, the improvement that

⁽⁶⁴⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 106.

⁽⁶⁵⁾ *Ibid.*

⁽⁶⁶⁾ *Ibid.*

⁽⁶⁷⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 109.

⁽⁶⁸⁾ M. ACKERMAN, *op. cit.*, 2005, p. 334.

⁽⁶⁹⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 113.

⁽⁷⁰⁾ M. ACKERMAN, *op. cit.*, 2005, p. 349.

⁽⁷¹⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 114.

workers acquire in their position through the union erases the presumption of not being a free consent; but if the renunciation prohibition is considered to be based on other reasons, related to the nature of rules, the conclusion cannot be the same, since non-waivable rules shall always have such nature, either referred to an individual or to a collective person ⁽⁷²⁾. We shall address both considerations.

As regards the first one, it should be concluded that the principle of non-renunciation would not be applicable to collective agreements, since they were signed by employees organised in unions.

Regarding the second one, it requires further analysis, in order to determine which are those rules that have a non-waivable nature.

Which would be those rules having a non-waivable nature?

According to Raso Delgue, all heteronomous rules have such nature, understanding by 'heteronomous' all the law passed by the Government (e.g. Parliament, Executive Power); thus, collective agreements could renounce to benefits established by the same parties in previous collective agreements, but not to benefits established by other (heteronomous) sources of the law. Indeed, Raso Delgue has expressed that the validity of each rule is necessarily related to the centre of power that created it, and such same centre of power can always modify it (...); collective bargaining cannot reduce benefits established by a legal rule: the imperativeness of heteronomous labour regulations is imposed to all society members, either individual or collective persons [...]. But a collective agreement does have the possibility to reduce or repeal benefits established in a previous collective agreement [...]. The same persons who agreed on a contract can afterwards modify or eliminate it ⁽⁷³⁾.

Certainly, the criterion of the 'centre of power', to follow Raso Delgue's words, is absolutely impeccable.

But do *all* heteronomous rules have a non-waivable nature?

In order to determine which heteronomous rules do, certain quotation made by Plá Rodríguez could bring light:

Gottschalk [...] affirms that Labour Law doubly limits private will: on one hand, to protect people's physical and moral integrity during work, and on the other hand, to protect them against the exploitation of their economical inferior position. Both kind of limits imply imperative law; but, due to its goals, the consequences of its non-compliance are different: A legal standard whose purpose is to prevent accidents in the workplace or child labour cannot be modified through people's will [...], whereas those legal standards whose purpose is to remove the employee's economic and/or hierarchic predominance [...] can be modified by contracting parties, if their will is formed and expressed under certain unequivocal acts and circumstances manifesting freedom and equivalence of both contracting parties ⁽⁷⁴⁾.

This statement clearly displays that some rules have a non-waivable nature and, thus, they must be always respected, either by individuals or by collective persons, while

⁽⁷²⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 153.

⁽⁷³⁾ J. RASO DELGUE, *El Principio de la Irrenunciabilidad y la Negociación Colectiva* [The Principle of non-renunciation and the Collective Bargaining] en *Veintitrés Estudios sobre Convenios Colectivos/Twenty Three Studies on Collective Agreements*. Montevideo, Fundación de Cultura Universitaria, 1988, p. 296-297.

⁽⁷⁴⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 136.

other rules do not have such nature and, in these cases, the non-renouncing principle is set not because of its nature but because it is assumed that the individual employee is unable to express an actual free will, a situation that no longer exists when employees are organised in unions. But the quotation also displays which rules are those with a non-waivable nature, and they have many connections with the concept of (work) public order to which we have already referred.

Plá Rodríguez agrees with Gottschalk's concepts, stating that not all laws (...) are beyond the scope of people's will (...) once there is a real freedom, the principle of the free will autonomy recovers all its role; therefore, the author concludes that collective agreement, in such situations, may state different provisions than the law ⁽⁷⁵⁾.

As already expressed, we believe that those rules having a non-waivable nature are those included within ILO's concept of 'universal labour guarantee'.

But except for those public order issues, in all the rest, we affirm that, as regards the relation between collective agreements and the law, the first ones should prevail, not only because they are the *special* or *specific* rules, but mainly because they are supposed to **directly express the will of the represented will**. Due to the principle of collective autonomy, the result of such autonomy (the collective agreement) should prevail, and should only yield when facing public order issues. To express it taking the figure of the web, we would say that the protection principle, which tinges with a certain colour the entire circle corresponding to Labour Law and the principles within, acquire another tint when it comes to the inner circle of collective Labour Law. In fact; the protection principle in collective Labour Law manifests through guaranteeing the freedom of association, the collective bargaining processes and the right to strike; but then, the principle of collective autonomy emerges, only limited by public order issues. Heteronomous rules (e.g. laws passed by Parliament) should prevail over collective agreements only when their **content** is referred to public order (compelling) issues. We fully agree with what Raso Delgue expresses in another paper, when he says that we should ask ourselves whether law's supremacy is subtracting collective agreements a very important role to play, and that excessive rigidity, instead of guaranteeing a stronger protection to the employee, could be generating what have been called an undercover flexibility ⁽⁷⁶⁾. We absolutely agree with these words, as well as with his conclusion, when he expresses that we do not agree with Labour Law deregulation, but we do believe in the importance of collective bargaining as the source for adapting Labour Law to new facts. With such a logic, the collective agreement – far from disappearing –, may acquire greater validity than in the past, and therefore revitalise the role of collective autonomy within the system. Less imperative and more disposable laws should enable Labour Law to continue ruling the transformations of work ⁽⁷⁷⁾. In the same way, Villavicencio Ríos has expressed that

Law has to do with all that is related to general interest: performing a generative, guaranteeing and promoting function for collective autonomy, which could be

⁽⁷⁵⁾ A. PLÁ RODRÍGUEZ, *op. cit.*, 2015, p. 137.

⁽⁷⁶⁾ J. RASO DELGUE, *El Conflicto entre la Ley y el Convenio Colectivo* [The Conflict between the Law and the Collective Agreement]. *Treinta y Seis Estudios sobre las Fuentes del Derecho del Trabajo/Thirty Six Studies on the Sources of Labour Law*. Montevideo, Fundación de Cultura Universitaria, 1 ed, 1995, pp. 317-318.

⁽⁷⁷⁾ J. RASO DELGUE, *op. cit.*, 1995, p. 319.

summarised in the role of establishing a legal frame which enables an effective exercising of the right (that is, not any collective *laissez-faire*). But as for collective autonomy, it prevails over the law in all that has to do with collective interests: regulation of the working conditions and relationships among social actors ⁽⁷⁸⁾.

Moreover, we agree with Grossi when he expresses that perhaps it is the moment to start building Law also by those who are usually called the ‘recipient’ of the Law ⁽⁷⁹⁾. As Grossi states,

There is a big difference between Law and legislation; they are two concepts that should not be identified as equal, and that, before becoming into power or into formal categories, Law is experience, that is to say, it is an aspect of social life. It is imperative to recover legality beyond State and beyond power; it is mandatory to recover legality for society as a whole reality ⁽⁸⁰⁾ [...] It is obvious that Governments cannot give up from establishing certain basic lines, but it is also clear that it is mandatory to set a “dis-legalisation”, abandoning the enlightened mistrust towards society and developing an actual legal pluralism with the individuals as performing active leading roles within the organization of the Law, as they do with social change. Only then, it will be possible to fill the ditch between social change and legal system ⁽⁸¹⁾.

In conclusion, we submit that, when it comes to *collective* Labour Law, the legal system must really protect, promote and foster the rights of freedom of association, collective bargaining and the right to strike, through the actions proposed in the ILO’s concept that we have quoted in previous paragraphs. But then, once social actors are collectively organised, they shall have sufficient scope of action. Indeed, in collective Labour Law the principle of collective autonomy shall always prevail, except for public order’s issues (‘universal labour guarantee’). This is also a way of having powerful organizations and responsible leaders, and a way of fostering collective bargaining, enabling social actors to address themselves their own subjects, both the ‘traditional’ ones as well as the new challenges.

4. Final Comments

In ILO’s 100 years, and thinking about the concept ‘labour is not a commodity’, we believe it is mandatory to claim the grounds of Labour Law itself, which is the protection principle and, through it, to claim all the principles of Labour Law, applied with a normative function and world wide, due to their supra-constitutional nature and hierarchy, such as human rights are, since they are the very frame of the legal system, conceived, thus, as a web, being **human dignity** at the very centre of it. Indeed, having

⁽⁷⁸⁾ A. VILLAVICENCIO RÍOS, *El Principio de Autonomía Colectiva* [The Principle of the Collective Autonomy], in *Los Principios del Derecho del Trabajo en el Derecho Peruano. Libro Homenaje al Profesor Américo Plá Rodríguez/The Principles of Labour Law in Peruvian Law. Book in Tribute to Professor Américo Plá Rodríguez*. Lima, Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social, 2004, p. 55.

⁽⁷⁹⁾ P. GROSSI, *op. cit.*, 2003, p. 60.

⁽⁸⁰⁾ P. GROSSI, *op. cit.*, 2003, p. 45.

⁽⁸¹⁾ P. GROSSI, *op. cit.*, 2003, p. 92.

placed human dignity and human rights in the central point has resulted in the fact that all the concepts displayed throughout this paper contain the human-centred approach, that is inside the concept ‘labour is not a commodity’, and that has also been stated in ILO’s Centenary Declaration for the Future of Work and, definitely, it is a concept that deserves to be highlighted, fostered and promoted in current times.

References

M. ACKERMAN, *Tratado de Derecho del Trabajo*, tomo I [Treatise of Labour Law, volume I]. Buenos Aires, Rubinzal-Culzoni Editores, 2005

G. ALPA, *General Principles of Law*, in *Annual Survey of International & Comparative Law*, Vol. 1: Iss 1, Article 2, 1994

H-H. BARBAGELATA, *Los Principios del Derecho del Trabajo de Segunda Generación* [The Second Generation Principles of Labour Law], in *IUSLabor*, 1/2008

H-H. BARBAGELATA, *El Particularismo del Derecho del Trabajo y los Derechos Humanos Laborales* [The Peculiarities of Labour Law and the Labour Human Rights]. Montevideo, Fundación de Cultura Universitaria, 2 ed, 2009

H. BARBÉ PÉREZ, *Los Principios Generales del Derecho como Fuente de Derecho Administrativo en el Derecho Positivo Uruguayo* [General Principles of Law as a Source of Constitutional Law in Positive Uruguayan Law], in *Los Principios Generales de Derecho en el Derecho Uruguayo y Comparado/The General Principles of Law in Uruguayan and in Comparative Law*. Montevideo, Fundación de Cultura Universitaria, 2 ed, 2005

H. BARRETTO GHIONE, *Teoría y Método en Derecho del Trabajo. Su Aplicación a los Consejos de Salarios* [Theory and Method in Labour Law. Its Application to the Wage Councils]. Montevideo, Fundación de Cultura Universitaria, 2018

J. BENGOTXEA, *The Legal Reasoning of the European Court of Justice*. Oxford, Clarendon Press, 1993

R. DWORKIN, *Taking Rights Seriously*, Bloomsbury Academic, 2013

O. ERMIDA URIARTE, *Meditación sobre el Derecho del Trabajo* [Meditation of Labour Law]. Cuadernillos de la Fundación Electra/*Electra Foundation Booklets*, Montevideo, 2011

O. ERMIDA URIARTE, Los Derechos Laborales como Derechos Humanos. [Labour Rights as Human Rights], in Conferencia en el Postgrado “Trabajo y Derechos Fundamentales” de la Universidad de Castilla –La Mancha, Campus de Toledo/Lecture of the Postgraduate Course: “Work and Humman Rights”, in the University of Castilla-La Mancha, Toledo’s Campus, 2010

O. ERMIDA URIARTE, *Empresas Multinacionales y Derecho Laboral* [Multinational Companies and Labour Law]. Montevideo, Ediciones Jurídicas Amalio M. Fernández, 1981

S. EVJU, *Labour is not a commodity A Reappraisal*. Oslo/Kongsberg Institutt for privatrett, 2012

P. GROSSI, *Mitología Jurídica de la Modernidad* [The Mythology of Modern Law]. Madrid, Editorial Trotta, 2003

ILO's GLOBAL COMMISSION ON THE FUTURE OF WORK, *Work for a Brighter Future*, 2019

ILO, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director General*, 2008

E. JIMÉNEZ DE ARÉCHAGA, H. ARBUET-VIGNALI, and R. PUCEIRO RIPOLL, *Derecho Internacional Público. Principios, Normas y Estructuras*, tomo I. [International Public Law. Principles, Norms and Structures. Volume 1]. Montevideo, Fundación de Cultura Universitaria, 1 ed, 2005

J. LALANNE, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law], in *Labour Law Journal*, no. 11, 2015

H. PODETTI, *The Principles of Labour Law*, in *Labour and Social Security Institutions, series G, n. 188, of the UNAM Legal Investigations*, 1997

A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo* [The Principles of Labour Law], Montevideo, Fundación de Cultura Universitaria, 4 ed, 2015

A. PLÁ RODRÍGUEZ, *Los Principios del Derecho del Trabajo ¿Constituyen una Fuente del Derecho?* [Principles of Labour Law: are they a Source of Law?], in *Treinta y Seis Estudios sobre las Fuentes del Derecho del Trabajo/Thirty Six Studies about Labour Law's Sources*. Montevideo, Fundación de Cultura Universitaria, 1995

J. RASO DELGUE, *Labour Law as a Branch of the Law and its New Borders*, in *Chilean Journal of Labour Law and Social Security*, vol. 7, No. 13, 2016

J. RASO DELGUE, *El Principio de la Irrenunciabilidad y la Negociación Colectiva* [The Principle of non-renunciation and the Collective Bargaining] en *Veintitrés Estudios sobre Convenios Colectivos/Twenty Three Studies on Collective Agreements*. Montevideo, Fundación de Cultura Universitaria, 1988

J. RASO DELGUE, *La Contratación Atípica del Trabajo* [The Atypical Contracting of Work], 2 ed, 2009

J. RAZ, *Legal Principles and the Limits of the Law*, in *Yale Law Journal* Volume 81, Issue 5, Article 2, 1972

M. VALVERDE, *Principios y Reglas en el Derecho del Trabajo: Planteamiento Teórico y Algunos Ejemplos* [Principles and Rules in Labour Law: Theoretical Proposal and Some Examples], in *Revista Española de Derecho del Trabajo* No. 114/*Spanish Labour Law Journal* No. 114, 2002

A. VILLAVICENCIO RÍOS, *El Principio de Autonomía Colectiva* [The Principle of the Collective Autonomy], in *Los Principios del Derecho del Trabajo en el Derecho Peruano. Libro Homenaje al Profesor Américo Plá Rodríguez/The Principles of Labour Law in Peruvian Law*.

Book in Tribute to Professor Américo Plá Rodríguez. Lima, Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social, 2004

G. ZAGREBELSKY, *El Derecho Dúctil* [The Adaptable Law]. Madrid, Editorial Trotta, 2 ed, 1997